McDaniel Ford, Inc. *and* Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Cases 29–CA–18811 and 29–CA–18992

January 28, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND HIGGINS

On September 30, 1996, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, McDaniel Ford, Inc., Hicksville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Leon Balsam full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following as paragraphs 2(b) and (c) and reletter the subsequent paragraphs accordingly.

"(b) Make Leon Balsam whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision."

"(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Leon Balsam and the warning to Mike Roth and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and warning will not be used against them in any way."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees concerning their membership in, support for, or activities on behalf of Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, the Union.

WE WILL NOT promise our employees medical benefits or other improvements in their term and conditions of employment, in order to dissuade them from supporting or joining the Union.

WE WILL NOT interfere with the administration of the Union by suggesting or directing that our employees choose a different shop steward or that they resign from their position as shop steward or assistant shop steward.

WE WILL NOT invite our employees to quit their employment in response to their activities on behalf of the Union or their exercise of other protected concerted activities.

WE WILL NOT discharge, issue written warnings to, or otherwise discriminate against our employees because of their membership in, support for, or activities on behalf of the Union.

WE WILL NOT bypass the Union or deal directly with our employees.

WE WILL NOT refuse to bargain in good faith with the Union by unilaterally and without notifying or bargaining with the Union, discontinuing our incentive pay system, modifying working hours by reclassifying our employees, or by making any other changes in terms and conditions of employment of our employees.

WE WILL NOT refuse to bargain in good faith with the Union by failing and refusing to make contributions on behalf of bargaining unit employees, including

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent's president, Rick McDaniel, unlawfully threatened the Respondent's mechanics in violation of Sec. 8(a)(1) when he told them at a meeting in early December that if employees were unhappy they should look for jobs some place else. The threat was made following McDaniel's statement that he did not know why everyone was against him and his complaint that employees did not want to work overtime and would not go along with a direct deposit system. Accordingly, we find that the threat was made in response to the employees' protected concerted activities.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). We shall also substitute a new notice that conforms with our Order.

regular part-time employees, into the Union's funds, by failing and refusing to include regular part-time employees in the bargaining unit or by refusing to recognize the Union as the collective-bargaining representative of such employees, or by refusing to apply the collective-bargaining agreement to those employees.

WE WILL NOT refuse to bargain in good faith with the Union by canceling collective-bargaining meetings without sufficient explanation and without giving adequate notice to the Union.

WE WILL NOT refuse to bargain in good faith with the Union with respect to the selection of an arbitrator.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Leon Balsam full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Leon Balsam whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Leon Balsam and the warning to Mike Roth and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharge and warning will not be used against them in any way.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit, including regular part-time employees, concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract.

> All service employees employed by us, excluding service advisors, office clerical employees, new and used car salespersons, guards, watchmen, professional employees and supervisors as defined in the Act.

WE WILL restore the incentive pay that we previously had in effect for our employees and make employees whole for any losses that they may have suffered as a result of our conduct, plus interest.

WE WILL transmit all contributions that we have not paid to the Union's funds, and make whole unit employees, including regular part-time employees for any losses they make have suffered from our failure to make such payments, as well as from our failure to apply the contract to part-time employees, with interest.

WE WILL bargain in good faith with the Union concerning the selection of an arbitrator, and comply with any agreement that may result from such bargaining.

MCDANIEL FORD, INC.

Sharon Chau, Esq., for the General Counsel.
Donald L. Rood, Esq., of Hicksville, New York, for the Respondent.
Stephen E. Appell, Esq. (Sipser, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 259, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union or Charging Party), the Regional Director for Region 29 issued a complaint and notice of hearing on November 9, 1995,[1] alleging that McDaniel Ford, Inc. (Respondent) has violated Section 8(a)(1) and (5) of the Act. The trial with respect to the allegations raised by the complaint was held before me on March 4, 1996, in Brooklyn, New York. A letter brief has been received from the General Counsel and has been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a New York corporation located in Hicksville, New York, where it is engaged in the retail sale and service of automobiles and related products. During the past year, Respondent derived gross revenues in excess of $500,000 and purchased and received at its Hicksville, New York facility automobiles and other goods valued in excess of $5000 directly from points outside the State of New York. It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

At all times material, and at least since February 1988, Respondent has recognized the Union as the collective-bargaining representative of its employees in an appropriate unit consisting of:

> All service shop employees employed by Respondent, excluding service advisors, office clerical employees,

[1] All dates are in 1995 unless otherwise indicated.

[2] While every apparent or nonapparent conflict in the evidence may not have been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Therefore, any testimony in the record which is inconsistent with my findings is discredited.

new and used car salesperson, guards, watchmen, professional employees and supervisors as defined in the Act.

The parties entered into a collective-bargaining agreement (the Agreement) covering employees in the unit on June 2, 1988, effective from February 1, 1988, to January 31, 1991.

The Agreement includes a union-security clause, requiring union membership after 30 days of employment, as well as a probationary period of 30 days. Additionally, the contract defines the workweek as 5 consecutive days per week, 40 hours per week, 8 hours per day, Monday to Friday, based on Respondent's schedule at the time, with time-and-a-half for overtime and Saturdays. It also provides that "starting hours may be changed by mutual agreement between the Employer and the Union provided no change shall be made in starting time for the purpose of staggering employees."

The Agreement also contained a grievance and arbitration provision, which culminated in arbitration by the American Arbitration Association or to an arbitrator selected by it.

The contract also requires that Respondent make contributions for all unit employees to the Union's Welfare and Pension Funds.

Finally, the contract lists a number of job classifications with starting rates and salaries. They include mechanic "A," mechanic "B," new car make ready, lube-rack-helper, partsman "A," metalman combination, painter, and utilityman.

On May 28, 1991, Respondent and the Union entered into a memorandum of agreement, extending the prior contract for 4 years, until January 31, 1995, with all of its terms and conditions in full force and effect except for certain modifications as specified.

The modifications included increases in wages and contributions, as well as the following clause with respect to the selection of an arbitrator: "All disputes under the agreement shall be submitted to an arbitrator selected by mutual consent."

Negotiations for a new agreement began on November 16, 1994. At a meeting on November 22, 1994, attended by Union Business Agent William Pickering, Shop Steward Mike Roth, Assistant Steward Rick Erickson, Respondent Attorney Don Rood, and Parts and Service Director Tony Citera, the parties reached tentative agreement on terms for the signing of a new memorandum of agreement. Rood requested that Pickering prepare a memorandum of agreement incorporating the terms that the parties had agreed on. On December 7, 1994, Pickering submitted the memorandum to Rood, who in turn informed Pickering that everything looked in order, but he would have to obtain the approval of Respondent's president, Rick McDaniel, who was allegedly out of town. Rood told Pickering to return to the facility on December 19 to pick up the signed memorandum.

Sometime in early December, Respondent held a meeting of all its mechanics. President Rick McDaniel was present along with Citera, General Manager Thomas McDaniel, and Business Manager Gus Morris. Rick McDaniel told the employees that he did not know why everyone was against him, and he wanted them to help improve his business. He made specific reference to the fact that employees did not want to work overtime and would not go along with a direct deposit system. McDaniel added that if employees were unhappy working there, they should look for a job some place else. McDaniel also mentioned that he wanted to institute work on Saturday in addition to more overtime.

Shortly after this meeting, Shop Steward Roth was called into McDaniel's office with Citera also present. McDaniel asked Roth to talk to other employees and see if they were willing to work overtime and/or on Saturdays. Roth replied that he would ask the men. Roth subsequently spoke to all seven mechanics, and was told that three would be willing to work a few hours of overtime at night, and two were willing to try on Saturday. Roth then reported to Citera that a few men were willing to stay and work a little overtime, and a couple of men might try Saturdays as long as it was good work. Citera replied "fine" and said he would notify McDaniel.

On December 19, Pickering went to the shop, as he had been instructed by Rood, to pick up the signed agreement. Rood told Pickering that McDaniel had not returned from vacation yet. He also informed Pickering that there was a little bit of a question about the guarantee and cost of insurance. Rood told Pickering to return the next day, December 20, at 3 p.m. Pickering complied with Rood's request, and returned on December 20, only to be told that McDaniel was in Santo Domingo. They agreed to meet again on December 23.

Meanwhile, on December 20, Respondent distributed a memo to its employees, announcing that effective January 1, 1995, Respondent would be expanding its parts and service hours from 8 a.m. to 4:30 p.m. and from to 8 a.m. to 6:30 p.m. It is undisputed that Respondent did not notify or consult with the Union regarding this memo or the subject matter contained therein.

Upon receiving a copy of this memo, Roth immediately confronted Citera and Rood, and protested that the employees had never agreed on any specific hours. Rood then asked Roth to go find out what hours the employees would be willing to work. When Roth then spoke to the employees, they were upset that Respondent had issued the memo and informed Roth that since Respondent had done so they were not willing to work any extra hours. Roth reported to Rood that nobody was willing to work any overtime or Saturdays. Rood made no reply to Roth.

Several days later, Pickering was given a copy of the memo by Roth and informed of what had happened. Pickering then protested to Rood and asked him what happened. Rood responded that he would look into it.

Because the employees would not agree to work the hours, Respondent implemented the new schedule by hiring two part-time employees, Anthony Broncato and Mike Nuzzi. They worked 2 hours a day, from 4:30 to 6:30 p.m. on a regular basis for from 2 to 4 months. Respondent did not notify any union official that it intended to hire these part-time employees. However, Citera did tell Shop Steward Roth that if the current employees would not work overtime Respondent "would have to go elsewhere." Roth replied, "Do what you've got to do." Respondent, by Citera, asserted that these two part-time employees were not in the unit, although they were clearly performing unit work, because they were like "outside vendors," who Respondent calls in on an as-needed basis to perform work such as installing a sun roof or air-conditioning.

On December 23, Pickering again went to the shop, anticipating picking up the signed memorandum of agreement as

promised by Rood. However, once more, Rood informed Pickering that McDaniel was still in Santo Domingo, and the meeting was rescheduled for December 27. On that day, Roth had given Pickering a copy of another memorandum signed by McDaniel addressed to employees, dated December 23, 1994. This memo discontinued the employees weekly incentive plan as of December 27, 1994. This incentive plan, which provided a bonus for employees for producing work in an expedited fashion as measured by the job book, had been in effect for nearly 10 years.[3] Pickering and Roth protested to Rood on December 23 about Respondent's actions. Rood informed Pickering that Respondent was working up a new incentive plan and that it would be announced in a couple of weeks. However, Respondent never instituted a new incentive plan for the employees. It is undisputed that Respondent did not notify or bargain with the Union before it eliminated the incentive plan in December 1994.

On December 27, once again Pickering went to the shop, only to be once more informed that McDaniel was out of town. Pickering replied that since he was there, "Why don't we address some of the issues?" Rood responded, "Not today, Rick's not here." The parties set another date, January 3, 1995, for the next meeting.

On January 3, Pickering went to the shop and was again told that McDaniel was in Santo Domingo and there could be no meeting. They agreed to meet in mid-January. Pickering reminded Rood that the contract expires on January 31. Rood nodded his head. Also on January 3, Respondent issued a memo, signed by McDaniel to all mechanics entitled "shop steward position." The memo informs the employees that "due to a conflict in personalities and ideas Tony Citera and I are having a difficult time working with Mike Roth, your Union Representative."

The letter then goes on to suggest that the employees elect a new shop steward, although making clear that it would still work with Roth if the majority still want Roth to represent them.

On January 9, Roth was given a written warning for failure to meet his weekly guarantee for the week ending January 3, 1995. The warning states that if no change or correction is made "further disciplinary action shall be taken." Roth had failed to meet his guarantee between 10 and 24 times over the past several years, and had never received either a written or a verbal warning for this conduct.

Employee Steven Napolitano, who was employed by Respondent for 6 years, failed to meet his guarantee on numerous occasions during 1994. Napolitano estimated that from once a month or every other week he would not meet his guarantee. Napolitano never received a written warning from Respondent for this conduct, although he was spoken to about it verbally by Citera on several occasions. In this connection, Mike Roth admitted that in his capacity as shop steward he had received copies of written warnings issued by Respondent to other mechanics, and that in some cases the warnings related to the failure of these employees to meet productivity standards. According to Roth, these were "a few" of such situations. No further evidence was adduced by Respondent as to the frequency or extent of past written warnings in general or concerning this issue in particular.

[3] However, the incentive plan was not included in the contract.

On January 7, Respondent advertised a "Happy Hour Special" in the newspaper, for the hours of 4:30 to 6:30 p.m., wherein it offered lower prices for certain work done during these hours. By letter dated January 11, the Union, by Pickering, protested Respondent's action, claiming that Respondent's practice obstructs the fair distribution of work to regular service shop personnel who work during the normal hours of 8 a.m. to 4:30 p.m.

On January 25, Citera, without notifying or negotiating with the Union, told new car prep employee Don Burke that he was being reclassified to a "B" mechanic. Roth who was present at the time asked Citera why Respondent was making this change.

According to Citera, Burke had previously mentioned that he intended to retire in the spring of 1995. The other prep employee had quit. Therefore Citera claims that he decided to disband the new prep department unit, and reclassify Burke as a "B" mechanic. Burke worked 1 week as a mechanic and then quit, telling Citera that he did not like the pressure of being a "B" mechanic and having to make his guarantee.

On January 27, Pickering met with Rood and Roth. During this meeting Pickering complained about Respondent's action of reclassifying Burke without checking with the Union. Pickering asserted that Burke had not performed mechanics' work for over 10 years, and that Burke could not handle the work. Rood made no response to this complaint by Pickering.

Pickering also asked Rood why Respondent had eliminated the incentive plan without talking to the Union or getting the Union's consent. Rood replied that Respondent was going to come up with a new plan.

Pickering also complained to Rood about Respondent's failure to make prompt fund contributions for employees Gary Caggiano and Steve Kempster. Rood responded that he would "look into it."[4]

On or about January 31, 1995, the Union and Respondent executed an extension agreement for 3 years to expire on January 31, 1998. The Agreement extends all terms and conditions of the prior agreement, except for changes as specified, which included changes in contribution rates to the Funds, as well as wage increases.

Leon Balsam was first employed by Respondent on November 28, 1994. He worked primarily in the parts department, stocking parts, sweeping up in the parts department, and "chasing" down parts. On occasion he would sweep up the rest of the shop. From 7:30 to 9:30 a.m. his duties were to check in customers' cars and to drive customers home. From 9:30 a.m. to 4:30 p.m. he performed work in the parts department, as described above.

When he was hired, he was interviewed by Parts Department Manager Gary Mullin. Mullin told Balsam that he would be receiving benefits after 30–60 days of employment. Mullin did not mention anything about a union during this conversation. In late January or early February 1995, Balsam asked Business Manager Gus Morris when he would be re-

[4] In that connection, Pickering testified that Respondent owed money to the Funds on behalf of Dempster, and that he had previously spoken to Rood about the subject. Pickering also testified that Respondent owed money to the Funds for Gary Caggiano for October 1994 through January 1995.

ceiving benefits. Morris responded, "You'll get your benefits when I'm ready to give them to you."

Shortly thereafter, Balsam approached Pickering in the shop and asked about joining the Union. After ascertaining what work Balsam performed, Pickering stated that he could be classified as a utility employee and could join the Union. Pickering gave Balsam a union card to fill out and sign, and told Balsam to send a check for $150 and he would be in the Union. Balsam signed the card that evening and returned it to Pickering along with his check for his initiation fee.

In early February, Pickering spoke to Mike Nuzzi and Anthony Brancato, the two part-time employees that had been employed by Respondent to work from 4:30 to 6:30 p.m. They told Pickering that they were primarily performing new car prep work. It seems that although Respondent employed the part-time employees to perform "premium work," the "Happy Hour" special advertised by Respondent was not successful and very few new customers were produced during these hours. Therefore, Respondent assigned Nuzzi and Brancato to perform new car prep work, previously performed by Burke, who had resigned.

After ascertaining this information, Pickering complained to Citera about the fact that Nuzzi and Brancato were performing bargaining unit work, once performed by Burke. Citera replied, "too bad."

On February 15, Pickering made the same complaint to Rood in the presence of Citera. Pickering urged Respondent to be considerate to Burke and let him retire with dignity by bringing Burke back as a new car prep employee. Rood replied that he would look into it. Citera stated that if the Union pays Burke's insurance Respondent would bring him back. Pickering responded that, "You know we can't do that. You should be ashamed of yourself for what you did." Both Citera and Rood concluded that portion of the discussion by asserting, "this was what Rick wanted."

Pickering also told Rood that it was the Union's position that because these part-time employees were performing bargaining unit work they belong in the bargaining unit. Rood replied that he would look into it and would get back to Pickering. In fact Rood never got back to Pickering on the matter. Respondent did not consider these employees as bargaining unit members while they were part-time, and made no payments to the Funds for these employees. Brancato quit after about a month. Nuzzi worked for several months as a part-time employee and then became a full-time employee. At some subsequent time, undisclosed by the record, he became a union member and was thereafter covered by the contract.

At this same meeting, Pickering reminded Rood that they had not agreed to an arbitrator and suggested to Rood that the parties agree to AAA or to Roger Maher, the arbitrator designated in the industry agreement. Rood asked Pickering to show him the language in the Association contract where Maher was designated as an industrywide arbitrator. Pickering showed the Association agreement to Rood, who replied that he would look into Pickering's request.

On this same day, Pickering also gave Rood Balsam's signed membership card. Rood replied that Balsam was not recognized by the Union because he is in the parts department. Pickering answered that Balsam was a "utility man." Rood shook his head and the conversation ended.

On February 16, Rood sent a letter to Pickering concerning the matters that they had discussed on February 15. The letter asserted that Respondent "rejected your attempt to sign Leon C. Balsam, a parts employee, as a union member." The letter further asserts that only shop employees are unionized and that the parts department has never been unionized.

Additionally with reference to the arbitration provision, Rood promised to review it. Also, Rood claimed that there was no provision in the contract prohibiting the use of part-time employees, or to the use of "outside vendors."

A day or two later, Balsam was summoned to Citera's office. Citera asked if it was true that he was involved in joining the Union. Balsam replied, yes. Citera then asked why he had joined. Balsam answered that he wanted benefits and medical coverage. Citera informed Balsam that he could not join the Union because the parts department was not part of the Union. Balsam replied that Citera would not stop him from joining the Union and that "it was against the law."

On or about February 19 or 20, Citera again called Balsam into his office. Once more Citera asked Balsam why he had joined the Union, while again telling Balsam that "you can't join the Union." Citera also told Balsam that if he would "drop" the Union and stop pushing to get into the Union Citera would see what he could do about getting Balsam medical benefits through the Company. Balsam answered that it was too late and that he had already written the check. At that point, Citera put his hands on his head, shook his head, and said, "You shouldn't have done that." Balsam added that his father had been in a union for 35 years, and that Citera could not stop him from joining the Union.

On February 21, Parts Department Manager Tony Walsh told Balsam that he was terminated because Respondent was closing down the parts department. Balsam asked how Respondent could close down the parts department in a dealership. Walsh responded, "get out."

Citera testified concerning Respondent's decision to terminate Balsam. According to Citera, in December 1994 Respondent employed three employees in the parts department: Manager Gary Mullin, Tony Nichols, and Balsam. In late December, Mullin notified Respondent that he was leaving and Respondent hired Anthony Walsh to replace Mullin. Citera claims that 3 days after he quit Mullin called and asked to return to work. Citera asserts that he said that he would look into it, and that by the third week in January he had decided to comply with Mullin's request. Therefore, Citera testified that he made the decision to terminate Balsam because Mullin would be returning to work, and the department is generally a three-man department, although it has been up to four at times depending on business. Mullin returned to work for Respondent at the end of February or the beginning of March.

However, Respondent also hired another employee, James Muzzi, to work in the parts department, doing exactly the same job as Balsam had performed without recalling Balsam. Neither Citera nor any other official of Respondent provided any explanation of why it hired James Muzzi rather than recalling Balsam.

On March 19, Pickering, along with Roth and Carlo Oliveri, another union representative, urged Rood to agree on an arbitrator so the parties could settle a number of pending disputes. They discussed Roger Maher and the AAA but there was no resolution.

On March 21, Rick McDaniel, in the presence of Citera, handed three warning letters to Assistant Shop Steward Walter Erickson while they were discussing a grievance concerning overpayment to some mechanics. McDaniel told Erickson that he had three choices with respect to these letters. The three choices were: call the Union about the letters or mind his own business and do his work, or give Respondent 90 days' notice and resign. McDaniel informed Erickson that employees Burke and Caggiano were afraid to return to the shop because Erickson came across as an authoritative figure. Erickson replied that he had no control over other people and that he was just doing his job as assistant shop steward. McDaniel responded, "Maybe you should just stay there in your work, do what you have to and mind your own business." At least three times during this conversation McDaniel told Erickson that he thought that Erickson should give up his assistant shop steward position. McDaniel further informed Erickson that McDaniel was going away for a week, and that Erickson should go home and talk it over with his wife, and give McDaniel his decision when McDaniel returns. Erickson did in fact resign as assistant shop steward after this conversation.

Pickering testified that in the industry it was common practice to submit disputes to the AAA, and that Arbitrator Roger Maher has been used by the Automobile Dealers Industrial Association as a permanent arbitrator, and by other employers who were not members of the Association in the same capacity. Additionally, the Union has provided some contracts for submission of disputes to the New York State Employment Relations Board (NYSERB) or the New Jersey Board of Mediation or the Connecticut Board of Mediation and Conciliation.

On May 3, Rood wrote to Pickering in connection with the selection of an arbitrator, stating that he had reviewed the Union's proposal, and "I am not agreeable to your selection of either the arbitrator or the American Arbitration Association." Rood proposed the selection of Martin Massel, Esq. of Mineola, New York.

On July 7, Union Attorney Stephen Appell wrote to Rood. Appell indicated in the letter that the Union had been trying to secure commitment from Rood to select an arbitrator for years and had been unsuccessful. The letter, after reciting the many choices suggested by the Union, such as the AAA, NYSERB, or Roger Maher, added that, "Your only substantive response was to suggest designating an attorney with whom I was totally unfamiliar, otherwise you have done nothing but avoid giving a positive response." Appell requested that Respondent "advise immediately upon a reasonable choice for the selection of an arbitrator."

By letter of July 7, Rood responded that there had been discussions over the years concerning the selection of an arbitrator, and that he had suggested Massel, a lawyer practicing in Mineola who was campaigning for the county legislator, or the Better Business Bureau, which were not acceptable to the Union. Therefore, since Respondent was not agreeable to the Union's selections, Rood suggested that each side should pick an outside individual and let them pick an arbitrator.

By letter dated August 7, Appell asserted that Rood's suggestion would not work because "we would no doubt be faced with a deadlock as each designee maintained the position of his or her respective party." Therefore, Appell submitted a list of 13 arbitrators who, according to the letter, "have distinguished themselves in the labor relations field and who regularly hear cases in the New York City—Long Island area." The letter requests that Respondent agree to any one of these 13 or to accept the AAA, NYSERB, or Roger Maher. The list submitted by Appell actually contained 12 names of well-known arbitrators in the labor relations field.

On August 15, Rood responded by stating that he was not familiar with any of the arbitrators suggested by Appell, and was not in a position to accept any of them. Instead, Rood attached a list of three names who he characterized as "well known attorneys on Long Island any of which I feel would be well qualified to serve as arbitrators." The list of three includes Massell who, as noted, the Union previously rejected, and two other attorneys, Frank Corso and Ed Robinson, located in Westbury and Oyster Bay, New York, respectively. No evidence was presented by either side whether any of these three attorneys had any experience in labor arbitration. However, Appell, in his closing argument, made the representation that none of the three individuals proposed by Rood were known in the field of labor relations.

III. ANALYSIS

1. The alleged interrogation and promise of benefit

I have found above that Citera twice called Balsam into his office, and asked him if and why he had joined the Union. During both of these conversations, Citera expressed his hostility towards Balsam's efforts to join the Union by telling him that he can't join, and during the second conversation, shaking his head and telling Balsam, "You shouldn't have done that." Additionally, Citera promised Balsam that if he would "drop" the Union that Citera would see what he could do about getting Balsam medical benefits through the Company. This statement by Citera constitutes a clearly unlawful promise to Balsam to provide him medical benefits if he withdrew his support from the Union in violation of Section 8(a)(1) of the Act. *River City Sand & Gravel Co.*, 280 NLRB 1492, 1516 (1988).

I also conclude that Citera's questioning of Balsam concerning his union activities was coercive, since the interrogation took place in Citera's office, the locus of managerial authority, *SSC Corp.*, 317 NLRB 542, 546 (1995); *Pacesetter Corp.*, 307 NLRB 514, 517–518 (1992), were accompanied by statements of hostility towards Balsam's union activities, *Liberty Natural Products*, 314 NLRB 630, 640 (1994); *SSC*, supra at 542 fn. 1, as well as the aforementioned unlawful promise of benefits.

Therefore, I find that Respondent unlawfully interrogated Balsam in violation of Section 8(a)(1) of the Act.

2. Respondent's conduct regarding the shop steward and assistant shop steward

On January 3, Respondent wrote a letter to employees informing them that Respondent's representatives were having a difficult time working with Mike Roth as shop steward, and suggesting that employees elect a new shop steward. By such conduct, Respondent has unlawfully interfered with the administration of the Union and has thereby violated Section 8(a)(1) of the Act. *Cooper-Jarrett, Inc.*, 260 NLRB 1123, 1124 (1982); *Monks, Inc.*, 232 NLRB 978, 982 (1977).

Similarly, on March 21, Respondent once again interfered with the administration of the Union by directing Walter Erickson to resign as assistant shop steward, again in violation of Section 8(a)(1) of the Act. Additionally during this conversation with Erickson, McDaniel gave him three options to consider, one of which was to resign as an employee and give 90 days' notice. It is well settled that an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that support for their union or engaging in other concerted activities and their continued employment are not compatible, and implicitly threaten discharge of the employees involved. *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Kenrich Petrochemicals*, 294 NLRB 519, 531 (1989); and *L.A. Baker Electric, Inc.*, 265 NLRB 1579, 1580 (1983). Here, as McDaniel's invitation to Erickson to quit was clearly in response to his continuing in his role as assistant shop steward, Respondent has further violated Section 8(a)(1) of the Act by such conduct.

Moreover, during a meeting of employees in early December, McDaniel criticized employees for being "against him" by not wanting to work overtime or not going along with a direct deposit system. He added that if employees were unhappy there they should look for a job some place else. This comment by McDaniel, which was also in response to his employees' concerted refusal to work overtime or accept the direct deposit system, is similarly violative of Section 8(a)(1) of the Act. *Kenrich*, supra; *Bill Scott Oldsmobile*, 282 NLRB 1073, 1074 (1986).

3. The change in work hours and alleged direct bargaining

In December 1994, Respondent discussed with its employees hours of overtime at a meeting that he wanted to institute work on Saturday in addition to increasing overtime. Shortly thereafter, Shop Steward Roth was summoned into McDaniel's office, where Roth was asked to talk to the other employees and see if they were willing to work overtime or on Saturdays.

When an employer attempts to circumvent the collective-bargaining representative, and deals directly with the employees on matters encompassed in the bargaining relationship, it undercuts the ability of the union as the bargaining representative and violates Section 8(a) (1) and (5) of the Act. *Master Plastering Co.*, 314 NLRB 348, 349 (1994); *Days Hotel of Southfield*, 311 NLRB 856, 862 (1993); and *Harris-Teter Supermarkets*, 293 NLRB 743, 744–745 (1989). The above-described discussions by McDaniel with employees at the meeting, as well as with Roth individually, constitutes such unlawful direct bargaining and bypassing of the Union.

While Respondent seems to be suggesting that it acted lawfully, since it discussed the matter with the shop steward, it is clear that Roth had no authority to negotiate a modification of the collective-bargaining agreement on behalf of the Union.[5] *TLI, Inc.*, 271 NLRB 798, 804 (1984); *Spriggs Distributing Co.*, 219 NLRB 1046, 1049 (1975). Therefore, Respondent, having discussed the issues with the shop steward is not a defense to its unlawful conduct.

When Respondent instituted a new system of working hours, by its letter of January 2, 1995, without consulting or negotiating with the Union, it has unilaterally changed terms and conditions of employment of employees in violation of Section 8(a)(1) and (5) of the Act. *Vibra-Screw, Inc.*, 301 NLRB 371, 373 (1991), *Days Hotel*, supra at 862.

Respondent's contention that the changes were made based on an alleged agreement with the employees, communicated to it by Roth, fails on two grounds. First, the credible testimony establishes as I have found that there was never an agreement reached. While Roth had communicated to Respondent that some employees would be willing to work some extra hours and/or on Saturdays, there had been no specific discussion about how many extra hours, or any mention that work hours would be expanded from 4:30 to 6:30 p.m. every day.

Moreover, as I have detailed above, Roth was not authorized to negotiate a modification of the agreement and Respondent unlawfully bypassed the Union by discussing the matter with him and the employees. Therefore, these discussions with Roth cannot satisfy its obligation to notify and bargain with the Union concerning its expansion of work hours. I therefore conclude that by such conduct Respondent has violated Section 8(a)(1) and (5) of the Act.[6]

4. The written warning issued to Mike Roth

On January 9 Roth was issued a written warning for failure to meet his guarantee for the week ending January 3, 1995. The General Counsel alleges that this action constitutes a unilateral institution of a system of written warnings and productivity evaluations.

In that connection, the General Counsel relies on evidence from Roth and employee Napolitano that although both of them had on numerous occasions in the past failed to meet their guarantee they had never received a written warning for this practice. The General Counsel also relies on the testimony of Citera, who admitted that employees are usually warned verbally on a one-on-one basis first.

However, Citera did not testify that Respondent never issued written warnings, but only that normally it issues a verbal warning first. More significantly, Roth admitted that in his capacity as shop steward he had received copies of written warnings issued by Respondent to other mechanics, and that in a few cases the warnings related to the failure to meet productivity standards.

Accordingly, based on this admission from Roth, I conclude that Respondent had previously issued written warnings to employees, some with regard to productivity,

[5] In fact Pickering testified that both Roth had no such authority. Moreover Respondent adduced no evidence that Roth had such authority or that it ever negotiated such matters with Roth in the past.

[6] I note that the collective-bargaining agreement specifically provides that the workweek shall be 40 hours per week, 8 hours per day. Since Respondent's change increased daily working hours from 8 to 10 hours, Respondent's action can also be construed as an unlawful modification of the contract which requires the Union's consent before implementation, whether or not there was bargaining with the Union, or an opportunity to bargain. *St. Agnes Medical Center*, 287 NLRB 242 fn. 2 (1987); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). However, inasmuch as my findings, above, based on the complaint allegation substantially remedies the violations found, I need not make such a finding.

and that therefore the General Counsel has failed to establish a unilateral institution of a written warning system. I shall recommend therefore that this allegation of the complaint be dismissed.

However, I also conclude that the written warning to Roth was unlawful because it violated Section 8(a)(1) and (3) of the Act. In that regard, the warning was issued to Roth on February 9, a week after the dispute between Respondent and Roth over the change in hours, where the employees through Roth refused to agree to Respondent's schedule. Moreover, the warning was also contemporaneous with Respondent's previously described unlawful and unsuccessful attempt to persuade employee Roth as shop steward. Thus, the evidence is clear that Respondent exhibited animus toward Roth for his union activities, as well as animus toward union activities in general as demonstrated by the unlawful interrogations of and promises of benefit to Balsam, and the unlawful threat to Erickson.

Thus, the evidence is substantial that a motivating factor in Respondent's decision to issue the written warning to Roth was Respondent's annoyance over Roth's activities as shop steward. Clearly, Respondent has failed to show that it would have issued the warning absent Roth's protected conduct, particularly since Roth had never been warned even verbally about the identical conduct involved in the warning, although he had failed to meet his guarantee on numerous occasions. Moreover, employee Napolitano also never received a written warning for failing to meet his guarantee, although he had failed to meet it several times in the past. Thus, since Roth received this written warning shortly after the dispute about the change in hours and Respondent's unsuccessful attempt to have him removed as shop steward, the evidence is overwhelming that his protected conduct motivated Respondent's decision to issue him a written warning.

Accordingly, I conclude that Respondent's issuance of the warning to Roth is violative of Section 8(a)(1) and (3) of the Act.

5. The elimination of the incentive plan

The evidence is undisputed that Respondent eliminated as of December 27, 1994, its incentive plan for mechanics that had been part of the terms and conditions of employment of its employees for many years. It is undisputed that Respondent neither consulted with, notified, or bargained with the Union concerning this change.

Respondent appears to defend this action on the ground that the incentive plan is not included in the contract. This purported defense has no merit for several reasons. Firstly, whether or not the incentive plan is included in or provided for in the contract is not determinative. The issue is whether or not the plan has been in force for sufficient time to establish it as a term and condition of employment of the employees. *Arizona Portland Cement Co.*, 302 NLRB 36, 44 (1991). Here, there is no question that the plan having been applied to the mechanics for many years meets that test, and on that ground alone, Respondent's action in failing to notify or bargain with the Union, before eliminating it is violative of Section 8(a)(1) and (5) of the Act.

Moreover, in fact although the collective bargaining in force at the time make no specific reference to the incentive plan as such, it does contain several relevant provisions. Section 12 of the Agreement states that "no employees shall suffer any reduction in pay or loss of any normal benefits during the term of the contract." Thus, since the incentive plan is clearly an economic benefit to the employees, Respondent is not correct in arguing that the contract has not been violated by this action.

I would also note that sections 8 and 9 of the underlying agreement referring to sick days and holidays makes specific reference to "incentive mechanics" and the use of average pay in the calculation of these benefits for these employees.

Accordingly based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating its incentive plan for employees without notifying or bargaining with the Union. *Hedison Mfg. Co.*, 260 NLRB 590, 592 (1982); *Crystal Springs Shirt Co.*, 236 NLRB 882, 885 (1979).

6. The reclassification of Don Burke

It is undisputed that Respondent reclassified employee Don Burke from a new car prep employee to a "B" mechanic, without any prior notification, consultation or bargaining with the Union. Respondent's purported defense, as testified to by Citera, that Burke was going to retire anyway is no justification for Respondent's failure to fulfill its statutory obligation to the Union.

Accordingly, I conclude that by its conduct of unilaterally reclassifying Burke without notifying or bargaining with the Union Respondent has further violated Section 8(a)(1) and (5) of the Act. *Land O'Lakes, Inc.*, 299 NLRB 982, 986–987 (1990); *Honda of San Diego*, 254 NLRB 1248, 1269–1270 (1981).

The evidence also discloses that Respondent reassigned prep work that Burke previously performed to mechanics without consulting with or bargaining with the Union. Such conduct is also violative of Section 8(a)(1) and (5) of the Act and I so find.

7. The refusal to include part-time employees in the unit and refusal to recognize the Union as the representative of such employees

I have found above that after Respondent's mechanics refused to work the extra hours that it proposed, Respondent hired two part-time employees to work 2 hours a day, 5 days a week. After ascertaining that these employees were performing bargaining unit work, the Union, by Pickering, protested and demanded that they become part of the bargaining unit.

Although Rood initially replied that he would consider Pickering's request, Respondent never complied with Pickering's demand, never included these employees as part of the unit, and did not comply with the contract with respect to these employees during the time that they were part-time employees.

Respondent's defenses to its conduct as outlined in Rood's letter, as well as Citera's testimony, are without merit. Rood asserted in his letter that the contract does not prohibit the use of part-time employees. That may be true, but is not dispositive of the issue at hand.

The contract requires recognition for all "service shop employees." It makes no exclusion for part-time employees, nor does it state that only full-time employees are covered. In the absence of any evidence of past practice, or what the parties intended by the recognition clause, I conclude that these part-

time employees are included in the unit, since they regularly worked 2 hours per day, 5 days per week. See *Allied Stores of Ohio, Inc.*, 175 NLRB 966 (1969). (Employee averaging 4 hours per week included in unit.)

Accordingly, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to include these part-time employees in the unit, refusing to recognize the Union as the representative of these employees, and by refusing to apply the collective bargaining to these employees during the period of time that they were part-time employees.[7]

I would also note that even if, as Respondent appears to assert, part-time employees are not included in the bargaining unit Respondent would still be found to have violated the Act, since it admittedly failed to notify and bargain with the Union before assigning bargaining unit work to nonunit personnel. *Harris-Teeter Super Markets*, 307 NLRB 1075 fn. 1 (1992).

8. The failure to remit pension and welfare contributions

The evidence discloses that Respondent failed to make contractually required welfare and pension payments to the Union on behalf of admitted unit employee Caggiano for a period of at least 3 months and Dempster for a period of time undisclosed by the record.

Moreover, I have also concluded above that Respondent failed to apply the contract to the two part-time employees that it employed, including the failure to make contributions to the Union's funds on their behalf.

By such conduct, Respondent has violated Section 8(a)(1) and (5) of the Act. *King Manor Care Center*, 308 NLRB 884, 887 (1992).[8]

9. The cancellation of meetings

I have found above that between the period of December 19, 1994, to January 3, 1995, Respondent canceled five scheduled collective-bargaining meetings with the Union without offering any reasonable explanation, and more importantly without even having the courtesy to notify the Union of the cancellation of the meeting until Pickering appeared at the facility for the scheduled meetings.

It is clear that parties are obligated to apply as great a degree of diligence and promptness in arranging and conducting their collective-bargaining negotiations as they display in other of their business affairs. *West Coast Liquidators*, 205 NLRB 512, 516 (1973); *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980). The busy schedule of its negotiators is no defense to this obligation. *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978). "Labor relations matters are urgent matters too." *Insulating Fabricators*, 144 NLRB 1325, 1328 (1963), enfd. 338 F.2d 1002 (4th Cir. 1964).

There can be little doubt that by Respondent's conduct as described above, of canceling five meetings without notice and without sufficient explanation, Respondent has failed to display the degree of diligence that the statute requires. Indeed, it is hard to imagine that Respondent would treat any of its business customers or suppliers in such a cavalier, discourteous, and downright insulting fashion.

Particularly where this conduct has occurred in the midst of Respondent's other unlawful activities as outlined above, I conclude that it has further violated Section 8(a)(1) and (5) of the Act by its conduct in connection with these meetings. *A.H. Belo Corp.*, 170 NLRB 1558, 1565–1566 (1968); *Eastern Maine*, supra at 246–247; *Lawrence Textile*, supra.

10. The discharge of Leon Balsam

The evidence discloses that Respondent terminated Balsam within a week after Respondent became aware that he attempted to join the Union. Moreover, it is clear by virtue of the unlawful interrogations and promises of benefit directed towards Balsam for such conduct, as well as Respondent's stated position, that Respondent was strongly opposed to Balsam's protected conduct.[9]

I note that whether or not Respondent is correct in its view that Balsam was not properly considered a member of the bargaining unit, Balsam has a protected right to join or support the Union, and Respondent cannot discriminate against him for such conduct.

In view of the foregoing facts, coupled with the numerous other unfair labor practices committed by Respondent as outlined above, the evidence is compelling that Balsam's efforts to join the Union motivated Respondent's decision to terminate him.

Respondent has fallen far short of meeting its burden that it would have discharged Balsam, absent his protected conduct. *Wright Line*, 251 NLRB 1053 (1980).

I note initially that when Respondent by Walsh notified Balsam of his discharge, Walsh informed him that Respondent was closing down the parts department. This preposterous explanation, not supported by any testimony from any witness, and inconsistent with the reason asserted by Citera for the termination, significantly detracts from Respondent's ability to meet its burden of proof.

Further Citera's testimony that Respondent terminated Balsam because it decided to rehire Mullin, who had previously quit, does not withstand scrutiny. Thus, Respondent allegedly decided to rehire Mullin during the third week in January, yet Balsam wasn't terminated until February 20. Moreover, Mullin was not rehired until the end of February or early March. Most significantly of all, even after it rehired Mullin, Respondent hired another employee who performed the identical work previously performed by Balsam, and made no attempt to offer that position to Balsam. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1176 (1990).

Accordingly, Respondent has not shown that it would have terminated Balsam absent his protected conduct, and has thereby violated Section 8(a)(1) and (3) of the Act.

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[7] I note that one of the part-time employees became a full-time employee, after which Respondent included him in the bargaining unit.

[8] I shall leave to the compliance stage of the proceeding the precise amounts due to the Funds to remedy this violation. All payments missed for periods of time 6 months prior to the filing of the initial charge, January 6, 1995, shall be reimbursed to the Funds.

[9] I note particularly in this connection Citera's statement to Balsam, "you shouldn't have done that," in reference to his having joined the Union.

10. Respondent's alleged failure to make a good-faith effort to select an arbitrator

While the duty to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession, the insistence on extreme or unreasonable proposals can be part of the evidence in determining whether demands made by a particular party was designed to frustrate agreement in the collective-bargaining process. *Sparks Nugget, Inc.*, 298 NLRB 524, 527 (1990).

The question to be decided is whether Respondent made a good-faith effort to comply with the contractual requirement of selecting an arbitrator by "mutual consent." Although Respondent did make several counterproposals to the Union's suggestions in this regard, I am in agreement with the positions of the General Counsel and Charging Party that Respondent's conduct in this area was but another effort on its behalf to frustrate agreement with the Union, and to avoid its statutory obligations to bargain with the Union.

I note particularly the context of Respondent's conduct, coming contemporaneously with the numerous violations of the Act that I have found above, many of which constitute blatant and serious violations of its duty to bargain with the Union as the statutory representative its employees. These instances of Respondent's unlawful behavior, such as a number of unilateral changes, direct dealing with employees, interference with the Union's right to select its shop steward, cancellation of bargaining sessions, discriminatory warnings, and discharges, all demonstrate a propensity of Respondent to disregard its obligations to bargain in good faith with the Union.

Therefore, were I to evaluate Respondent's conduct with respect to the selection of an arbitrator in a vacuum, I would consider it to be a mere difference of opinion as to who should be selected as an arbitrator, which does not rise to the level of an unfair labor practice. However, when viewed in connection with aforedescribed violations of law of Respondent, I am persuaded that Respondent's conduct was designed to frustrate agreement and to impede the arbitration process.

I note that Respondent rejected the Union's suggestions for using the AAA or NYSERB as sources for the selection of an arbitrator as well as Roger Maher, an arbitrator used by the Association, or 12 other names submitted by the Union of arbitrators well known in the field of labor relations. It is significant that Respondent furnished no reasons to the Union for rejecting all Union's suggestions, and adduced no evidence in this proceeding as to why it refused to accept any of these proposals to use arbitrators experienced in labor relation matters. *Sparks Nugget*, supra at 525.

On the other hand, while Respondent did submit three names of attorneys as proposed arbitrators, it does not appear that any of them has had any experience in handling labor arbitration matters. In fact, Respondent adduced no evidence that any of the three individuals proposed ever had any experience in any arbitration matters, much less labor arbitration. While I do not suggest that only individuals experienced in labor arbitration matters are qualified to serve as arbitrators, I do believe that in the context of this case that Respondent's proposing such individuals, while rejecting without explanation the Union's suggestions to use numerous experienced labor arbitrators, can reasonably be viewed as an attempt to avoid Respondent's obligations to select an arbitrator and to impede the arbitration process.

I therefore find that Respondent has further violated Section 8(a)(1) and (5) of the Act. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1258–1259 (1994); *Independent Stave Co.*, 248 NLRB 219, 227–228 (1980); and *South Florida Hotel & Motel Assn.*, 245 NLRB 561, 608–609 (1979).

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their membership in or activities on behalf of the Union, promising its employees medical benefits in order to discourage them from supporting the Union, interfering with the administration of the Union by suggesting and directing that employees choose a different shop steward or that they resign from their position as a shop steward or assistant shop steward, and inviting its employees to quit their employment in response to their activities on behalf of the Union or their exercise of other protected concerted activities, Respondent has violated Section 8(a)(1) of the Act.

4. By discharging employee Leon Balsam, and issuing a written warning to employee Mike Roth, because of their membership in, support for, or activities on behalf of the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By bypassing the Union and bargaining directly with its employees, by unilaterally and without notifying or bargaining with the Union, discontinuing its incentive pay system, modifying working hours, reclassifying an employee from new car prep employee to a "B" mechanic, by failing and refusing to remit pension and welfare contributions to the Union Funds in violation of the collective-bargaining agreement, by failing and refusing to include regular part-time employees in the contractual bargaining unit and to recognize the Union as the bargaining representative of such employees, and to apply the collective-bargaining agreement to those employees, by canceling collective-bargaining meetings without offering sufficient explanation, and without giving adequate notice to the Union, and by failing to bargain in good faith with the Union with respect to the selection of an arbitrator, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section (6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes and policies of the Act.

Having found that Respondent discriminatorily discharged Leon Balsam, I shall recommend that Respondent offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him. All backpay provided shall be computed with interest on a

quarterly basis, in the manner described by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest computed in the manner and amount prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Additionally, I shall recommend that Respondent remove from its files any reference to the discharge of Balsam and its unlawful written warning issued to Mike Roth, and to notify them in writing that this has been done and that evidence of same will not be used as a basis for future actions against them.

I shall also recommend that Respondent restore its incentive plan that it unilaterally rescinded for its employees, and make its employees whole for any loss of earnings that they may have suffered as a result of this unlawful action.[10]

Additionally, I have found above that Respondent violated Section 8(a)(1) and (5) of the Act by failing to make pension and welfare contributions to the Union's Funds on behalf of several unit employees, including part-time employees, and that it failed to apply other parts of the contract to its part-time employees. To remedy these violations, I shall recommend that Respondent be ordered to make all contributions that it failed to make on behalf of bargaining unit employees, including part-time employees, to the Union's Welfare and Pension Funds, with any interest or other sums applicable to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

I shall also recommend that Respondent make whole bargaining unit employees, including part-time employees, for any losses that they may have suffered as a result of Respondent's failure to make contributions on their behalf or otherwise apply the contract to them, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 944 F.2d 502 (6th Cir. 1971); and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as computed in *New Horizons*, supra.

With respect to finding that Respondent did not bargain in good faith with the Union concerning the selection of an arbitrator, the Charging Party requests, with the concurrence of the General Counsel, an affirmative remedy that Respondent be directed to agree to one of the Union's suggestions for the selection of an arbitrator. I disagree.

It is well settled that the Board has no power to compel either party to agree to any substantive provision of a collective-bargaining agreement. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970); *J.P. Stevens & Co.*, 247 NLRB 738, 772 (1978); *Ameri-Crete Ready Mix Co.*, 207 NLRB 509 fn. 3 (1973).

Therefore, based on the above authorities, it is inappropriate to order Respondent to accept one of the Union's suggestions for an arbitrator, for such an order would be in effect dictating a substantive term of an agreement.

I note moreover that Respondent might very well be able to propose a different reasonable alternative to the Union's suggestions, such as perhaps other experienced labor arbitrators, or other suggestions that might satisfy its obligation to bargain in good faith with the Union concerning this issue, rather than attempting to impede the arbitration process as its previous conduct has demonstrated. I do trust, however, that Respondent will be guided by my analysis of its previous conduct as outlined above, in attempting to comply with the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, McDaniel Ford, Inc., Hicksville, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their membership in, support for, or activities on behalf of Local 259, International Union, United Automobile, Aerospace and Agricultural implement Workers of America, AFL–CIO.

(b) Promising its employees medical benefits or other improvements in their terms and conditions of employment, in order to dissuade them from supporting or joining the Union.

(c) Interfering with the administration of the Union by suggesting or directing that its employees choose a different shop steward or that they resign from their positions as shop steward or assistant shop steward.

(d) Inviting its employees to quit their employment in response to their activities on behalf of the Union or their exercise of other protected concerted activities.

(e) Discharging, issuing written warnings to, or otherwise discriminating against its employees, because of their membership in, support for, or activities on behalf of the Union.

(f) Bypassing the Union and dealing directly with its employees.

(g) Refusing to bargain in good faith with the Union by unilaterally and without notifying and bargaining with the Union, discontinuing its incentive pay system, modifying working hours by reclassifying an employee, or by making any other changes in terms and conditions of employment of its employees.

(h) Refusing to bargain in good faith with the Union by failing and refusing to make contributions on behalf of bargaining unit employees, including regular part-time employees, into the Union's Funds, and by failing and refusing to include regular part-time employees in the bargaining unit, and by refusing to recognize the Union as the collective-bargaining representative of such employees, and by refusing to apply the collective-bargaining agreement to those employees.

(i) Refusing to bargain in good faith with the Union by canceling collective-bargaining meetings without offering sufficient explanation and without giving adequate notice to the Union.

(j) Refusing to bargain in good faith with the Union with respect to the selection of an arbitrator.

(k) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

[10] Although Respondent also unilaterally changed the working hours of employees, and reclassified employee Burke without notifying and bargaining with the Union, no affirmative remedy is necessary, inasmuch as Respondent has already eliminated the 2 extra hours, and Burke has quit his employment.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Leon Balsam immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the warning to Mike Roth and the discharge of Leon Balsam and notify them in writing that this has been done and that evidence of the warning or discharge will not be used as a basis for any future personnel actions against them.

(c) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, including regular part-time employees, concerning rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed contract. All service shop employees employed by Respondent, excluding service advisors, office clerical employees, new and used car salespersons, guards, watchmen, professional employees and supervisors as defined in the Act.

(d) Restore the incentive pay plan that it previously had in effect for its employees and make employees whole for any losses they may have suffered as a result of Respondent's conduct, as set forth in the remedy section of this decision.

(e) Transmit to the Union's Funds, and make whole the unit employees, including regular part-time employees for any losses they may have suffered from Respondent's failure to make such payments, as well as from Respondent's failure to apply the contract to part-time employees, with interest as set forth in the remedy section of this decision.

(f) Bargain in good faith with the Union concerning the selection of an arbitrator, and comply with any agreement that may result from such bargaining.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Hicksville, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 7, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that all violations alleged in the complaint, but not found, are dismissed.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."